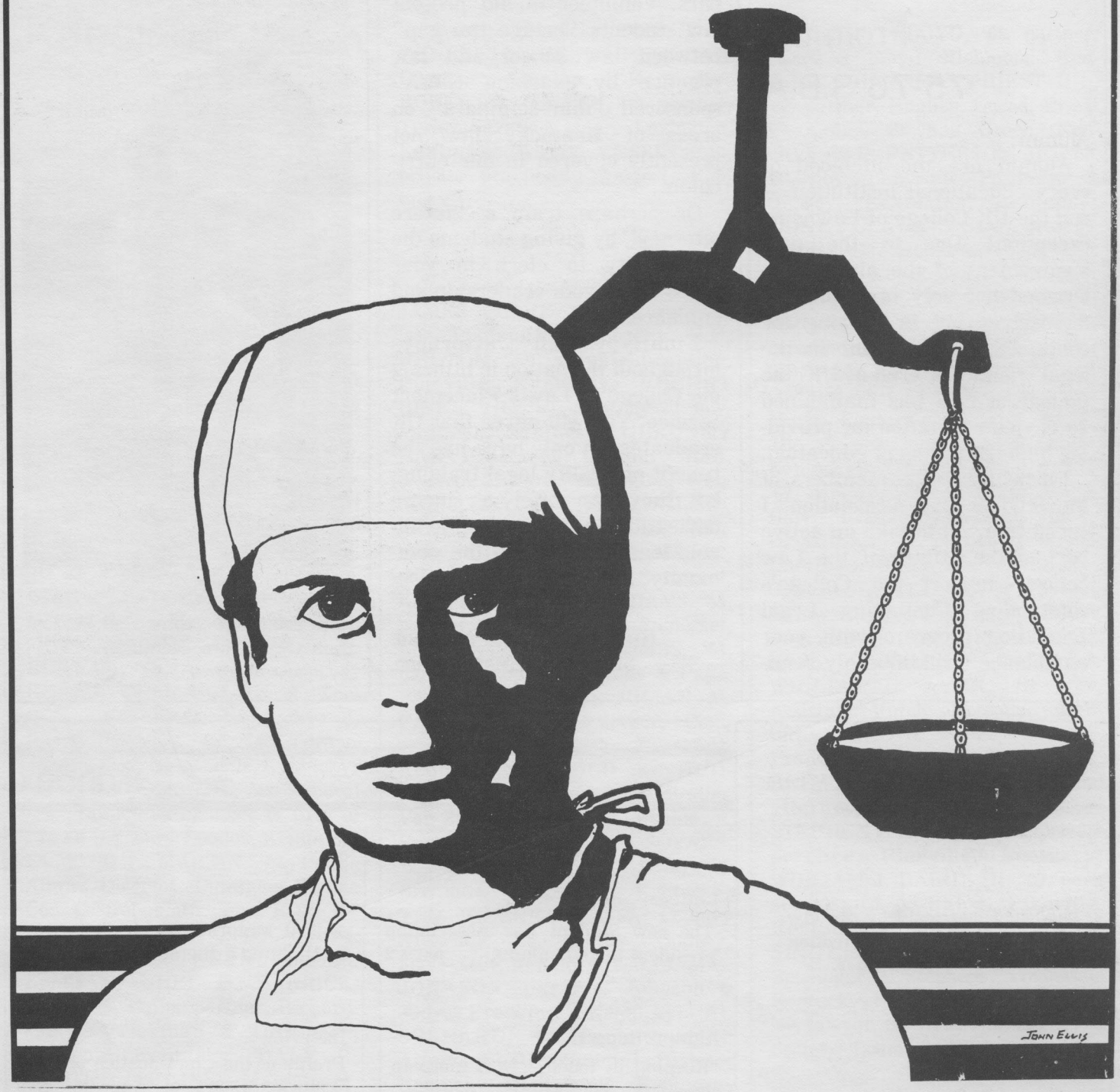
Malpractice Insurance..... PAGE 6



the review

of the law alumni association
college of law
university of kentucky

fall, 1975

From the 75-76 S.B.A.

Alumni:

Alumni are the lifeblood of every educational institution — and the UK College of Law is no exception! Due to the past involvement of the alumni, interested not only in improving themselves but in striving for continued improvement in the legal training offered at UK, the College of Law has maintained its envied reputation for providing high quality legal education.

On behalf of the members of the Student Bar Association, I encourage you to take an active part in the affairs of the Law School. Support the College's outstanding Continuing Legal Education program with your attendance at its monthly seminars. Volunteer to aid present law students "bridge the gap" between law school and law practice by teaching S.B.A.-sponsored "mini-seminars" on areas of Kentucky law not presently covered in our curriculum.

Or perhaps train a "future attorney" by giving students the opportunity to clerk in your office under your leadership and guidance.

Finally, join attorneys throughout the nation in utilizing the College of Law's Placement Service. You will agree that UK graduates not only have had the benefit of quality legal training, but they can offer a sincere dedication in improving available legal services to the community.

Ruth H. Baxter, President
Student Bar Association

Ruth Baxter is a third-year student from Owensboro, Kentucky.

the review

of the alumni association
college of law
winter, 1975

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Editor ..... *Betsy Browning*

Reporting ..... *John Heyburn*
Herb Miller

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Art ..... *John Ellis*

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Keeping in touch

(Editor's Note: The response to the first four issues of The Review continues to be so overwhelming that it will take a few more issues of The Review to report on all the U.K. Law Alums who have responded.)

Class of 1930-39 — ALFRED A. NAFF, '31, Attorney, Hopkinsville, Kentucky; BRUCE MORFORD, '34, Retired, Alexandria, Virginia; HARRY P. DEES, '35, Senior Partner, Kahn, Dees, Donovan & Kahn, Evansville, Indiana; EARL L. COLE, '37, Cole, Cole & Anderson, Barbourville, Kentucky; OLNEY B. OWEN, '38, Retired — (former Chief Benefits Director, Veterans Administration), Lexington, Kentucky; JO M. FERGUSON, '39, Partner, Grafton, Ferguson, Fleischer & Harper, Louisville, Kentucky.

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Class of 1970-75 — J.T. BEGLEY, '70, Gilson & Begley, Lexington, Kentucky; WILLIAM H. HAYS, JR., '70, private practice, Shelbyville, Kentucky; CHARLES R. HOLBROOK, III, '70, State Representative, 100th District, partner, Holbrook & Holbrook,

Law faculty is growing...

By JOHN G. HEYBURN, II

For those uncertain as to whether law school should emphasize "public interest" or private law, Bob Schwemm, one of U.K.'s newest faculty members, offers a unique compromise.

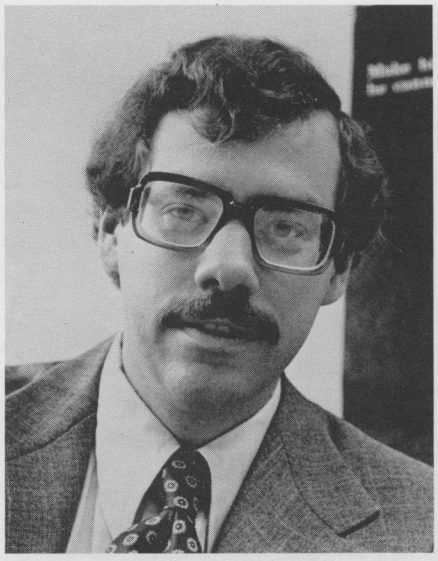
A 1970 Harvard Law School graduate, Schwemm worked two years in the Washington, D.C. office of Sidney and Austin, a 100-person Chicago law firm, and then — for three years — as chief trial counsel for a federally funded fair housing organization before coming to Kentucky.

Thus, the Amherst College Phi Beta Kappa graduate brings impressive academic credentials and a varied practical background to his first year of teaching.

The switch to fair housing litigation quickly made Schwemm no stranger to the courtroom. In less than three years, he brought over 200 cases in Federal court and achieved a perfect record on seven appeals to the U.S. Circuit Court.

Concerning his "undefeated" appellate record, Schwemm quips that, "it either means I'm a good appellate attorney or a lousy trial lawyer." What it most likely means is that Bob Schwemm has already "made" a fair amount of law in the 7th Circuit Court of Appeals.

...above all, Bob Schwemm wants to be a good teacher'



Bob Schwemm

The 30-year-old bachelor says that he left private practice despite the attractions of the Washington atmosphere, because it just takes too long to advance to a position of responsibility in a huge firm.

Schwemm says that he developed a desire to teach while presenting fair housing seminars to practicing attorneys around the country. Also, he admits that the pace of constant litigation is physically and emotionally draining.

It is not uncommon to hear Bob Schwemm asking students and faculty whom they consider to be the best teachers at the law school. One cannot escape the impression that, above all, Bob Schwemm wants to be a good teacher. His philosophy is that the practice of law does not consist entirely of studying appellate decisions, but — in fact — a great deal of common sense is necessary.

In any case, it is obvious that Schwemm brings a wealth of experiences, "learned by trial and error," to his first-year Procedure class, and to his duties as coordinator of the clinical program and the first-year Moot Court program.

alumni report...

Ashland, Kentucky; THOMAS B. RUSSELL, '70, associate, Waller, Threlkeld & Whitlow, Paducah, Kentucky; CHARLES BRANNEN, '71, member of firm of Flannery, McMurtry & Brannen, Covington, Kentucky; WILLIAM A. NISBET, III, '71, associate with Moore, Morrow, Frymire & McCaw, Madisonville, Kentucky; DAVID L. PATTON, '71, Commander of U.S. Army Military Police Company at Schofield Barracks, Hawaii; DAN BARTLEY, '72, Bartley & Harrington, Louisa, Kentucky; JOSEPH M. DAY, '72, associate with Barnett, Alagia, Greenebaum, Miller & Senn, Louisville, Kentucky; WILLIAM H. HADEN, JR., '72, associate with Rubin, Trautwein & Hays, Louisville, Kentucky; WILLIAM M. NIXON, '72, Assistant Professor of Law Enforcement, Eastern Kentucky University, Richmond, Kentucky; KATHERINE BOWDEN, '73, law clerk to Hon. Pierce Lively, U.S. Court of Appeals for the Sixth Circuit, Lexington, Kentucky; ALAN L. HACCINGTON, '73, partner, Bartley & Haccington, Louisa, Kentucky; EDWARD D. HAYS, '73, private practice, Danville, Kentucky; PAUL V. HIBBERD, '74, partner, Rogan & Hibberd, Danville, Kentucky; JAMES TERRY HODGES, '74, private practice, Columbia, Kentucky; R. WILLIAM TOOMS, '74, Brown & Toom.s, London, Kentucky.

Ms. Brandon

At a time when the coal boom has exploded in Kentucky with all its attendant problems, it is appropriate that one of U.K.'s newest law faculty is experienced in the related field of environmental protection.

Barbara Brandon comes to the law faculty after three years as Assistant Attorney General with the Pennsylvania Department of Environmental Resources. During that time, she became an expert in virtually all aspects of the Federal Clean Air Act, as well as regulations policies concerning deep and strip coal mining.

Her experience in the environmental area has been varied: legal advisor to the Governor's office on air quality matters, which are not at all a slight matter in her home town of Pittsburgh; author of state environmental regulations; and, during the past year, continuous litigation against the large steel companies.

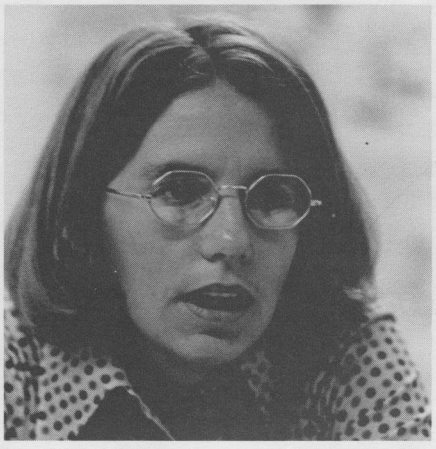
Ms. Brandon, who holds a J.D. from the University of Pittsburgh and an L.L.M. from Harvard, appears as equally at home discussing the need for deep mining regulations in Kentucky as she does the intricate workings of coking ovens in a steel plant. "After all," she said wryly, "if you're going to beat U.S. Steel, you've got to know as much about their job as they do."

As a result of her recent experiences in attempting to interpret and enforce both federal and state environmental laws, Ms. Brandon says she has become a "confirmed states-righter," believing that local and state government can be the most effective enforcement vehicle for protecting our environment.

Already, Ms. Brandon's expertise has been tapped by local environmental groups and by the Kentucky Law Journal, which is readying a coal symposium for publication.

Although she misses the thrill and excitement of litigation, not to mention beating U.S. Steel, Ms. Brandon's experiences should enliven her classes in Land Transfer Law, Environmental Law, and first-year Property.

Barbara Brandon



Carolyn Bratt

Ms. Bratt

While teaching secondary school in Syracuse, New York, Carolyn Bratt recognized the unfair situation that permitted boys' coaches extra pay for their duties, while denying benefits to the coaches of girls' teams. Ms. Bratt filed a suit which eventually won for women coaches the right to compensation for their duties. From these beginnings, Ms. Bratt has continued her concern for the advancement of womens' legal rights.

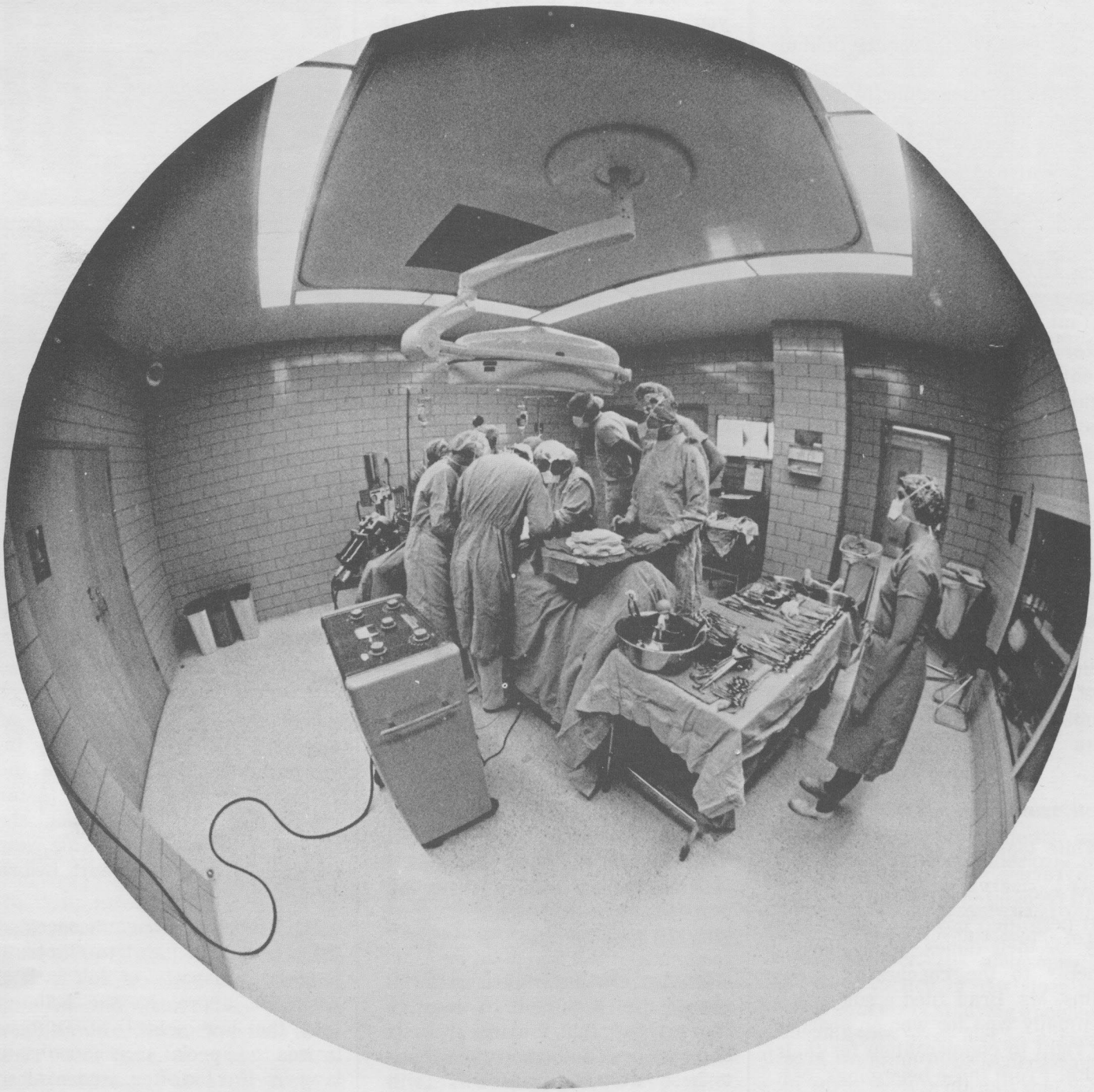
The 32-year-old New York native is as likeable and good-natured as she is sincere and informed about her beliefs. Although presently teaching Trusts and Estates and slated for Property in the spring, the 1973 Syracuse College of Law graduate intends to pursue her primary concern with the legal problems of women and the elderly. Plans call for Mrs. Bratt to teach a "Women and the Law" course this spring.

Ideally, she says, such material should be included in regular courses, but until faculty, students and case book authors are sensitized to these issues, separate courses will be necessary.

Teaching law perhaps came to Ms. Bratt predictably, because she taught secondary school history for six years prior to attending law school. She says that her love of teaching and her subsequent involvement in the law made the combination a natural. After graduating from law school, she clerked for one year with the New York State Supreme Court before coming to Kentucky.

Ms. Bratt has strong, unconcealed views about the need to eliminate regressive aspects of law school academic approach. She believes that the law school atmosphere breeds a special arrogance into lawyers. Far too often, students lose sight of the relationship between the law and life; the fact the clients have real problems and real feelings. For this reason, she considers the improvement and expansion of clinical opportunities to be vitally important.

the cover



Medical Malpractice Insurance,
a highly emotional issue, concerns many.

Physicians, attorneys and insurers are proliferating support to bring pressure to bear as the 1976 Kentucky Legislature will be...

...Spotlighting a dilemma

By BETSY BROWNING

Hippocrates didn't practice medicine in the complex, experimental, electronic year 1975. Medicine today, like the law, is infinitely more difficult and detailed than the art has ever been. As our lives grow more complicated, pressured, and trauma-ridden, so does our society. Doctors transplant hearts, eradicate polio, develop The Pill, and cure ills that were considered incurable even 10 years ago — but at a calculated cost. Not everyone gets well; and an equally complex, evolving society reacts. The resulting social crisis — the rising cost of malpractice insurance — has created a furor that the Greeks could not anticipate in their symmetrical, sunlit world. Physicians, medical societies, insurers, bar associations, and legislatures are all involved in trying to solve this urgent problem.

Dr. Colby Cowherd, President of the Fayette County Medical Society, told us that the Kentucky Medical Association feels that immediate legislative action is urgent. Although malpractice suits are not as common in Kentucky as they seem to be in other, more urban jurisdictions, this lack isn't reflected in the escalating insurance premiums. (Premiums are based in a national statistical table.) According to Cowherd, anesthesiologists have suffered the highest rise in premiums, as their specialty seems to be particularly high risk.

What about the few — but legitimate — cases of malpractice? "The medical profession is very aware of this problem, and is making every effort to judge the competence of every practicing physician," says Cowherd. Every incident in his particular bailiwick is reviewed, and the merits weight for action.

Dr. Cowherd would like to see an optional review board formed — made up of three doctors and three lawyers selected by the local medical society and bar association. This board would review every malpractice suit for merit before it goes to court. This process wouldn't deny any legitimate claim, but would help eliminate nuisance suits.

One legislative solution has already become public law in Indiana, and several bills concerning malpractice insurance and malpractice litigation are slated for proposal in the 1976 Session of the Kentucky legislature. The Kentucky Medical Association proposes the following problem areas for legislative action: 1) reporting and review of claims; 2) limitation on judgment; 3) limitation and review of contingency fees; 4) non-discovery statute and immunity of medical review board personnel and

I swear by Apollo Physician, by Asclepius, by Health, by Heal-all, and by all the gods and goddesses, making them witnesses, that I will carry out, according to my ability and judgment, this oath and this indenture:

...I will use treatment to help the sick according to my ability and judgment, but I will never use it to injure or wrong them ... I will not give poison to anyone though asked to do so, nor will I suggest such a plan ... But in purity and in holiness I will guard my life and my art. ... In whatsoever houses I enter, I will do so to help the sick, keeping myself free from all intentional wrong-doing and harm ... whosoever in the course of practice I see or hear (or even outside my practice in social intercourse) that ought never to be published abroad, I will not divulge, but consider such things to be holy secrets .. Now if I keep this oath and break it not, may I enjoy honour, in my life and art, among all men for all time; but if I transgress and forswear myself, may the opposite befall me.

..... *Hippocratic Oath*

...Spotlighting a dilemma

cover story...

records; 5) elimination of *ad damnum* clause; 6) collateral source provision; 7) advance payment provision; 8) statute of frauds; 9) an amendment to our existing statute of limitations make it applicable to minors at age siz; 10) expert witness; 11) informed consent; 12) periodic payment provision; 13) elimination of *res ipsa loquitur;* 14) basic insurance and excess pool, with the recommendation that the excess pool be funded out of general tax revenue; 15) punitive damages may not be demanded in any medical malpractice complaint; 16) comparative negligence in prorating awards in cases with multiple defendants.

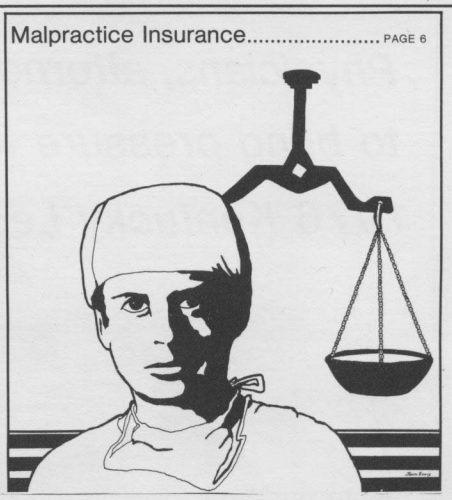
Justice is itself the great standing policy of civil society; and any departure from it, under any circumstance, lies under the suspicion of being no policy at all.

.....Edmund Burke

The Association of Trial Lawyers of America is an association of 25,000 trial lawyers, representing the trial bar in this country. This group has held a series of nationwide meetings on the rights of citizens for quality medical care, and prepared a position paper of responsibility ... for consideration by all thoughtful citizens. Prefaced by the above quote from Burke, this position paper endorses the following points: 1) the availability of malpractice insurance should be guaranteed; 2) reasonable insurance rates should be maintained with legislation; 3) efficiency measures — as compulsory binding arbitration — should be considered for professional liability insurance; 4) any proposal to eliminate or restrict contingent fees severely would mainly serve to deter or prevent injured patients with meritorious cases from asserting their rights; 5) a legislative reinsurance or catastrophe loss fund can be established to pay such losses above a minimum catastrophe limit; 6) legal rules — as *res ipsa loquitur* — serve a valid public purpose, and have little or no effect on malpractice insurance premiums. With rare exceptions, they are not the basis for recovery. The application of these legal doctrines should be a matter that should be decided by the courts in appropriate cases; 7) "no-fault" and "workmen's compensation type" malpractice plans are probably unconstitutional, and are certainly unfair to the patient. The statement concludes that the interests of the patient-consumer must be put above those of the physician, the lawyer, or the insurance carrier.

Obviously, there are areas in these legislative positions that are diametrically opposed. But Hippocrates also said, "Life is short, and the Art long; opportunity fleeting; experiment dangerous, and judgment difficult." It remains to be seen what compromises will be hammered out in the 1976 session of the legislature to solve at least a part of this crisis.

'Life is short and the Art long; opportunity fleeting; experiment dangerous and judgment difficult'



Chief Justice of the Kentucky Court of Appeals, the Honorable Scott Reed

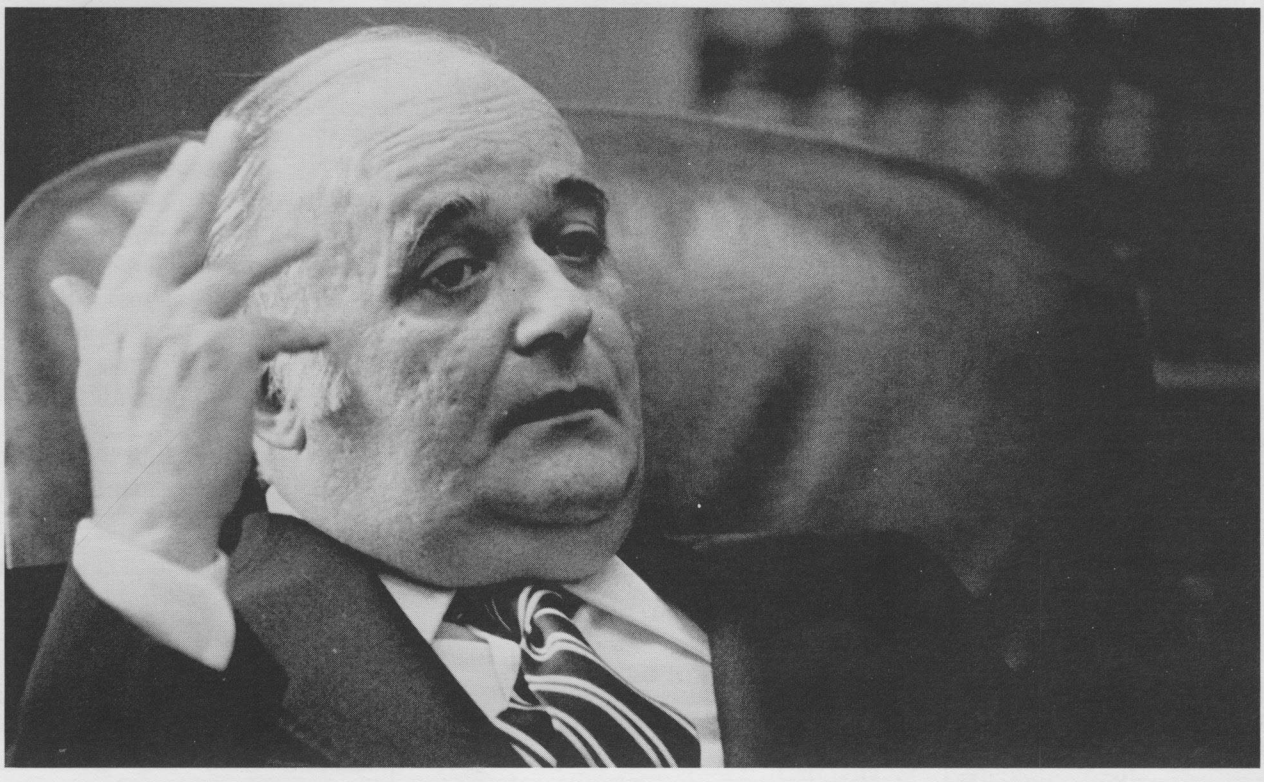
By BETSY BROWNING

When we (the general public) watch *Petrocelli,* or *Owen Marshall, Counselor-at-Law,* we are indoctrinated with an instant media image of a Chief Justice ... always theatrically crag-faced, stern, inscrutable, and fierce. Scott Reed, Chief Justice of the Kentucky Court of Appeals, emanates the benign twinkle of a Sunday School Santa Claus ... masking, one soon discovers, a razor-sharp mind.

On the bench Justice Reed is, no doubt, as stern and craggy as the best of Justices — but, in his chambers, he is a charming, articulate conversationalist and, obviously, a man in love with his job. A product of the Bluegrass, he was born (1921), educated (University of Kentucky, '45, U. of Ky. Law School, '48), and married (Sue Charles, 1946) in Lexington. He won the University's Sullivan Medallion Award in 1945; was an adjunct professor at the University of Kentucky's College of Law, and practiced law in Lexington for 20 years ... before opting to run for Circuit Judge.

The bench isn't for everybody ... and we asked Justice Reed why he chose such a rigorous judicial role. "It was a new challenge — and I wanted a new challenge, after practicing law for 20 years. I served five years as a trial judge, and I've been an appellate judge for seven years. It is, essentially, a different overall discipline ... and I've enjoyed it."

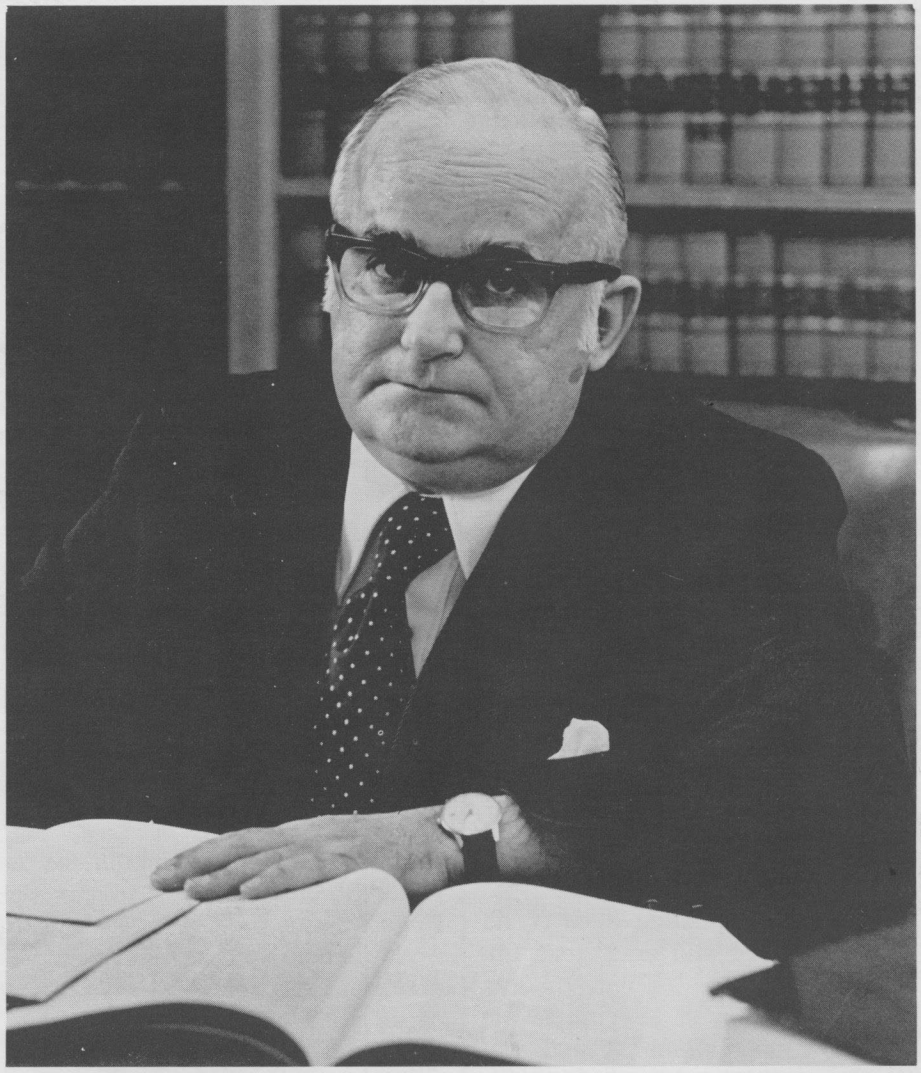
Since he has been involved in efforts to restructure the courts for a number of years, Justice Reed is very interested and active in the push for the Judicial Reform Amendment (a constitutional amendment that will be accepted or rejected by the citizens of the Commonwealth before this magazine is off the press). "This



time," he said, "the revived efforts have a varied history and agreement on detail. This amendment was constructed by more people in the field, and pragmatically tested for public acceptance. There are features some people don't like — some omissions — but it is a pragmatic compromise ... the art of the possible. If this amendment is passed, it will have an overall impact on the Bar and the public — as Kentucky will then have a uniform system of courts. The state will come into the 20th century with its court system."

We asked Reed what areas of the law he found had changed most dramatically in his 32 years of practice and experience on the bench. "Criminal law," was his first immediate answer. "The explosion of the Supreme Court decisions regarding the individual rights of the accused, and involving both the Bench and the Bar." He thought a moment. "New forms of litigation, post-conviction relief, the procedure of due process, and questions after judgment are major changes. Then, the law of torts has changed drastically with no-fault insurance, since automobile accident suits are all but eliminated. Certainly," he added, "the advent of strict liability in consumer claims is another major change."

As one of the newer options in legal education is clinical experience, we wanted to get an opinion from this adjunct law professor turned Chief Justice. Reed feels this is a coming and necessary field. The demands of practice, and the courts ... plus the increasing complexity of the law ... are going to encourage more quasi-professional experience for the new lawyer. "However," he commented, "there are practical difficulties. The apprenticeship system in England ... one that's been in existence for many years ... is being seriously reappraised. How do you pick the practicing lawyer who is best suited to be a clinical guide? Some, inevitably, will use an apprentice as a flunky. It's very tricky to match people —and eliminate abuse."



Reed is concerned about the future relationship of the Bar and society, and very much aware of social controversy and change. "One of the most serious problems is the delivery of legal services to the middle class. The very rich can afford a good advocate; the very poor have a court-appointed lawyer. The majority of the middle class hesitates to go to a lawyer at all — as they fear the expense. This is, to me, a critical problem, and one that must be solved." Warming to the subject, he added, "The law needs to reexamine a number of questions. Are there areas where the law has injected itself too much? And, is the law retaining areas that would best be left to some other solution? We must remember that, if people get so dissatisfied with the system of settling disputes that they get mad at the courts, our present legal system could be drastically changed."

"The law needs to reexamine a number of questions . . ."

Chief Justice Reed is a man at the peak — and justifiably so. He gets high marks in Frankfort for efficient administration, and high marks in our (the Law Alumni Association's) books for being one of the University of Kentucky College of Law's distinguished alumni.

LAW ALUMNI ASSOCIATION
COLLEGE OF LAW

UNIVERSITY OF KENTUCKY

LEXINGTON, KY. 40506

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College of Law growing. . .

By Dean GEORGE HARDY

For those who were unable to attend, the joint SBA-Alumni Association party following the homecoming game on November 5 was a distinct success. There were more than five hundred students and alumni present — and in approximately equal proportions. Everyone had a good time, and the unanimous reaction was that the occasion should become an annual fixture. The atmosphere was, of course, enlivened by the fact that the Wildcats had managed to subdue Tulane, but even a loss would not have changed the warm ambience. Special thanks are due Ruth Baxter, President of the SBA, from whom the idea came and who was responsible for the organization of the party. I also want to thank President Fred Nichols and the Alumni Association for matching the SBA's financial support. It was a true joint effort.

As some of our alumni may be aware, President Singletary has recommended that $1.75 million be appropriated for an addition to the College of Law building. This is much needed in view of the fact that the library will run out of shelf space in two or three years and that we have no further growth space for the program — or, indeed, sufficient space for what we are already doing. Also, the budget approved by the Board of Trustees included a recommended increase in the operating budget of $91,000 for the next biennium. As always, it isn't enough, but we are extremely fortunate to have fared this well considering the general budgetary squeeze faced by the University.

The report of the Study Group on Legal Education appointed by the Council on Public Higher Education was submitted to the Council in September. Chairman Stanley Chauvin of Louisville made the

dean's brief...

presentation to the Council and reports that the members seemed to understand the problems of legal education. Whether resources will follow as a response remains to be seen. In general observations, the group's report repeats some of the statistics contained in my last brief about the underfunding of legal education nationally. It goes on, however, to point out that all three of the state's schools have problems needing attention. One specific observation of importance to UK was that no one of the state's schools should be held back in the development of its program simply because others have needs that must be met. Some of the highlights of the recommendations of the study group were the following:

1. That short range emphasis should be placed on training practicing lawyers and providing a sound program of continuing legal education. Other missions, such as good research and service programs were recognized as important and often as interrelated to the basic program, but near term emphasis on basic missions was recommended.

2. That Kentucky's public law schools should not educate more than the present 1,800 total students. The questions of whether to educate less and at how many institutions were reserved for future consideration.

3. That sound legal education requires a student-faculty ratio of approximately 15:1. Present ratios run from 23:1 to 32:1.

4. That resources must be provided for more intensive programs in lawyering skills, such as litigation, counselling, negotiation, and legislative drafting and other writing skills. Such programs were viewed as being necessary not at the expense of but in addition to the traditional intensive study of legal theory and analysis.

5. That consideration and study be given to the possibility of character and fitness screening prior to or at the time of law school admission and that both more intensive instruction and research in professional responsibility be encouraged and supported.

6. That an appropriation be made to support a study of the feasibility of an interconnected, statewide system of law libraries with a network of local and regional collections linked to the state's major collections in the law schools and the Court of Appeals.

7. That a strong program of loan and scholarship aid be established for law students.

Other recommendations of the group ran mostly to the fact that virtually all facets of law school programs in Kentucky need greater support, including libraries, research programs and faculty support. For those who are interested, members of the Study Group want to pursue the recommendations in the report by building public interest and support. If you need or want local bar speakers or service club speakers to speak on legal education in Kentucky, contact Stan Chauvin in Louisville.

A final note in this collection of miscellany. I want to join the crowd in congratulating all of our alumni and others who had a hand in the passage of the new judicial article. ..... Now is the time to become interested in and active in support of effective implementations.

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